Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

92-1894

NO.

in the Supreme Court of the United States

October Term, 1992

NORTH FLORIDA SHIPYARDS, INC.,

Petitioner,

v.

LYKES BROTHERS STEAMSHIP CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL AND THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

William B. Milliken, Esq.
Counsel of Record
Hayden and Milliken, P.A.
5915 Ponce de Leon Boulevard
Coral Gables, Florida 33146
Telephone: (305) 662-1523

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a wharfinger must provide *Ryan* indemnity *(Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)), to a shipowner, given that: (a) the shipowner did not owe a warranty of seaworthiness to the injured third parties; (b) Congress abrogated *Ryan* indemnity at its point of origin in 33 U.S.C.A. §905(b); and (c) comparative fault principles should be applied uniformly in maritime personal injury cases.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Grounds for Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	11
Appendix	App. A-1

TABLE OF AUTHORITIES

Cases:	Page(s)
Bosnor, S.A. de C.V. v. Tug L.A. Barrios, 796 F.2d 776 (5th Cir. 1986)	5, 6, 9
Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974)	10
Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co., 651 F.2d 1096 (5th Cir. 1981)	5, 6, 9
Hurdich v. Eastmount Shipping Corp., 503 F.2d 397, 403 (2d Cir. 1974)	10
Lewis v. Timco, Inc., 716 F.2d 1425, 1428 (5th Cir. 1983) (*en banc*)	9
Oglebay Norton Co. v. CSX Corp., 788 F.2d 361 (6th Cir. 1986)	5, 6
The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903)	7
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)	i, 5, 6, 7, 8, 9, 10
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct 872, 90 L.Ed. 1099 (1946)	7

TABLE OF AUTHORITIES—(Continued)

Cases:	Page(s)
Sims v. Chesapeake and Ohio Railway, 520 F.2d 556 (6th Cir. 1975)	5, 6
Smith and Kelly v. Concordia Tadj, 718 F.2d 1022 (11th Cir. 1983)	5, 6, 7, 8, 10
United States v. Reliable Transfer Co., 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975)	8, 10
Statutes and Rules:	
33 U.S.C. §905b	i, 2, 8

NO.

in the Supreme Court of the United States

October Term, 1992

NORTH FLORIDA SHIPYARDS, INC.,

Petitioner,

v.

LYKES BROTHERS STEAMSHIP CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL AND THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Petitioner, NORTH FLORIDA SHIPYARDS, INC. ("NORTH FLORIDA"),[1] requests that a writ of certiorari be issued to review an Opinion of the First District Court of Appeal of Florida entered on November 19, 1992, and an Order of the Florida Supreme Court entered March 3, 1993.

[1]At all times relevant to this case, NORTH FLORIDA was a Florida corporation. Pursuant to Supreme Court Rule 29.1, NORTH FLORIDA states that it has no parent corporation or subsidiaries.

OPINIONS BELOW

The Opinion of the First District Court of Appeal of Florida (Pet. App. A) which is reported at 607 So.2d 516 (Fla.App. 1992). The Order entered by the Supreme Court of Florida which denied discretionary review of the Opinion of the First District Court of Appeal of Florida (Pet. App. B) and which Order will be reported in . . . So.2d . . . (1993).

GROUNDS FOR JURISDICTION

The Opinion of the First District Court of Appeal of Florida was entered on November 19, 1992, and the Order of the Florida Supreme Court denying discretionary review was entered on March 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED

33 U.S.C. §905(b) is involved in this case. Such section provides:

§905. Exclusiveness of Liability

* * * * *

(b) Negligence of Vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by

the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner *pro hac vice*, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner *pro hac vice*, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

William Echols ("Echols") and Edward Cowart ("Cowart") were injured on November 6, 1986, while operating the fire-fighting vessel, FIRE MARINE III, in the St. John's River, a navigable waterway in Jacksonville, Florida. Echols and Cowart were injured after the FIRE MARINE III allided with the fender system of the Isaiah T. Hart Bridge and, thereafter, collided with a barge owned by Gulf Atlantic Transport Corporation. Cowart was fatally injured in this accident.

Thereafter, Echols, Echols' wife, and Cowart's estate brought suit in the Fourth Judicial Circuit Court for Duval County, Florida, severally, against Gulf Atlantic Transport Corporation; the Jacksonville Transportation Authority (the bridge owner); owners of various vessels which were nested under the Hart Bridge, including LYKES BROTHERS

STEAMSHIP CO. ("LYKES"), as the owner of the M/V LYRA; and NORTH FLORIDA, which was the owner of the property adjacent to where the vessels were nested. There was no contact between the FIRE MARINE III and the LYRA, or any other vessels at NORTH FLORIDA.

All of the defendants ultimately settled with the plaintiffs, including LYKES and NORTH FLORIDA. LYKES then proceeded on a crossclaim for indemnity based upon the warranty of workmanlike performance against NORTH FLORIDA. NORTH FLORIDA had an oral agreement with LYKES to berth a LYKES' vessel at NORTH FLORIDA'S facility in the St. John's River at Jacksonville, Florida. There was no written indemnification provision. LYKES and NORTH FLORIDA are in agreement that there was no negligence on the part of either of them which was a proximate cause of the accident. The settlements were entered into purely for economic reasons.

In a Final Judgment entered on October 4, 1991, the Florida Fourth Circuit trial court ruled, as a matter of law, that LYKES was entitled to indemnity from NORTH FLORIDA under the warranty of workmanlike performance (Pet. App. C). On October 21, 1991, and October 28, 1991, NORTH FLORIDA filed Notices of Appeal upon the trial court's Final Judgment to the First District Court of Appeal of Florida (Pet. App. D and E). The trial court's ruling was then affirmed by an Opinion of the First District Court of Appeal of Florida dated November 19, 1992 (Pet. App. A). NORTH FLORIDA thereupon filed a Notice to Invoke Discretionary Jurisdiction requesting the Supreme Court of Florida to invoke its discretionary jurisdiction to review the Opinion of the First District Court of Appeal of Florida on December 15, 1992 (Pet. App. F). The Supreme Court of Florida thereafter declined to invoke its discretionary jurisdiction to review such Opinion by an Order dated March 3, 1993 (Pet. App. B).

REASONS FOR GRANTING THE WRIT

This matter involves the General Maritime Law of the United States and, in particular, whether *Ryan* indemnity continues to exist. The First District Court of Appeal of Florida has held that a wharfinger must indemnify a shipowner for settlements the shipowner entered into with personal injury claimants to whom the shipowner did not owe a warranty of seaworthiness. The Court of Appeal's holding was predicated on *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), and decisions of the federal Sixth Circuit Court of Appeals in *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), and *Sims v. Chesapeake and Ohio Railway*, 520 F.2d 556 (6th Cir. 1975).

The District Court of Appeal's decision is in conflict with decisions of the federal Eleventh Circuit Court of Appeals in *Smith and Kelly v. Concordia Tadj*, 718 F.2d 1022 (11th Cir. 1983), and the federal Fifth Circuit Court of Appeals in *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981), and *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776 (5th Cir. 1986). Furthermore, the Court of Appeal's decision involves legal questions going to the essence of whether *Ryan* indemnity exists at all and, in particular, in a situation where the shipowner does not owe a warranty of seaworthiness to the injured third parties. We respectfully submit that this Court should review the decision of the Florida Court of Appeal to settle these important questions.

I.

The First District Court of Appeal's decision improperly extends *Ryan* indemnity from a wharfinger to a shipowner where the shipowner did not owe a warranty of seaworthiness to the injured

> third parties and is in conflict with decisions of the federal Fifth Circuit Court of Appeals and Eleventh Circuit Court of Appeals.

The First District Court of Appeal's decision is predicated upon *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) and decisions of the Sixth Circuit Court of Appeals in *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), and *Sims v. Chesapeake and Ohio Railway*, 520 F.2d 556 (6th Cir. 1975).

The First District Court of Appeal of Florida ignored the decisional law of the federal Eleventh and Fifth Circuit Courts of Appeals in determining that LYKES was entitled to indemnity under the warranty of workmanlike performance. The decision rendered by the First District Court of Appeal of Florida is contrary to the decision of the Eleventh Circuit in *Smith and Kelly v. Concordia Tadj*, 718 F.2d 1022 (11th Cir. 1983), and the decisions of the Fifth Circuit in *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981) and *Bosner, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776 (5th Cir. 1986).

As succinctly stated in Bosner:

> The *Ryan* doctrine was designed to serve special problems in maritime law arising from the absolute and nondelagable duty of seaworthiness which general maritime law imposes upon all vessel owners.

Bosnor, supra, 796 F.2d at 784.

The Eleventh Circuit in *Smith and Kelly, supra*, described the rise and fall of the *Ryan* indemnity doctrine, as follows at p.1025:

> The *Ryan* story really began with the Supreme Court's decision in *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903). There, the court launched the action for unseaworthiness which imposes on a shipowner liability for any injury to a seaman that results from the ship's condition of unseaworthiness. The ship owner's negligence is not a predicate to liability [Citation Omitted]. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct 872, 90 L.Ed. 1099 (1946), the court extended the shipowners duty to maintain his ship in a seaworthy condition to cover any persons engaged in work traditionally done by seaman. This meant that shipowners would be liable for a longshoreman's injuries that result from the unseaworthiness of the ship.
>
> The enormous potential for unfairness that *Sieracki* created soon became apparent. In many cases, longshoremen are injured as a result of conditions of unseaworthiness that the stevedore, not the shipowner, creates. The Supreme Court responded in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956). The court inferred from the contract between the stevedore and the shipowner a warranty running from the stevedore to the shipowner, of "workmanlike performance". This warranty imposes on the stevedore a duty to complete its work "properly and safely." *Id.* at 133, 76 S.Ct. at 237. Where the stevedore had breached the warranty of workmanlike service, creating a condition of unseaworthiness aboard ship that

> resulted in injury to a longshoreman, Ryan required the stevedore to indemnify the shipowner for any liability it incurred in a *Seracki*-inspired suit. *Id.* at 132-35, 76 S.Ct. at 236-28.

The rationale for the indemnity based on breach of this implied warranty was predicated on two factors: (1) the shipowner's non-delegable duty to provide a seaworthy vessel to longshoremen; and (2) the fact that the longshoreman's employer, the stevedore, which takes control of the ship during stevedoring operations, is more capable than the shipowner of avoiding accidents. The core rationale was to place the ultimate responsibility for the longshoreman's safety on the party best in a position to prevent accidents, i.e., the stevedore.

The *Ryan* warranty with the concomitant indemnity was expanded by the lower courts to situations other than stevedoring. In 1972, however, Congress amended the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) and did away with the *Ryan* indemnity in the longshoring scenario. Since the abrogation of the indemnity by Congress, the lower federal courts have had occasion to revisit whether the indemnity exists as to any of the other areas where it had been judicially expanded by the lower federal courts.

The Eleventh Circuit has specifically held that the usual maritime comparative fault system should be applied rather than the *Ryan* indemnity. *Smith and Kelly, supra*, at p.1030. In reaching its conclusion that the *Ryan* indemnity should be replaced by comparative fault, the Eleventh Circuit noted the "*** wave of recent precedent calls for application of comparative fault principles." *Id.* at 1029. Specifically, the Eleventh Circuit referred to the Supreme Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), wherein

the Supreme Court replaced the divided damage rule in ship collision cases with the comparative fault standard. The *Smith and Kelly* court also looked to the prior decision of the Fifth Circuit in *Gator Marine, supra.*

The *Gator Marine* court also approved apportionment of liability based upon the usual maritime comparative fault system rather that *Ryan* indemnity. *Gator Marine, supra*, 651 F.2d at 1100. The Fifth Circuit in reaching its conclusions specifically noted that the 1972 Amendments to the Longshoremen's Harbor Workers Compensation Act had "legislatively abrogated the *Ryan Doctrine* at its point of origin", and then concluded that "[t]here is little logical appeal in this proposed extension of a doctrine so withered." *Gator Marine, supra*, 651 F.2d at 1100.

Moreover, in *Bosnor*, the Fifth Circuit specifically pointed out that its

> ". . . more recent decisions . . . have restricted the application of the Ryan doctrine to its factual context."

796 F.2d at p.785.

The Fifth Circuit further reiterated its support of the application of comparative fault principles rather than the "all or nothing approach" of *Ryan*, observing that:

> comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity. *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983)(*en banc*).

Bosnor, supra, 796 F.2d at 786.

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), this Court established the right to contribution among joint tortfeasors in maritime personal injury cases. One year later, in *United States v. Reliable Transfer Co., supra*, this Court abandoned the divided damages rule in collision cases and adopted a comparative negligence approach. In so doing, this Court recognized that the reasons which originally lead to the Court's adoption of the divided damages rule had long since disappeared. In the case of *Ryan* indemnity, the reason for that doctrine has also long since disappeared. As stated by the Second Circuit Court of Appeals in *Hurdich v. Eastmount Shipping Corp.*, 503 F.2d 397, 403 (2d Cir. 1974):

> The inflexibility of application of the *Ryan* doctrine was a product of the blanket prohibition against contribution in noncollision cases. The disappearance of that prohibition should presage the development of a more equitable and realistic approach toward dividing the burden between parties who are mutually at fault.

Ryan indemnity is unfair. Comparative negligence is the only system which is just; each is responsible for his own fault. *See generally, Smith and Kelly, supra*, at pp.1029, 1030.

The decision of the First District Court of Appeal of Florida herein is in conflict with the decisions of the federal Eleventh and Fifth Circuit Courts of Appeals on an issue of General Maritime Law. There is confusion within the lower courts as to whether *Ryan* indemnity exists in any setting and, in particular, whether it exists in a setting outside of the particular factual context of *Ryan* itself, i.e., to situations where the shipowner seeking indemnity does not owe a warranty of seaworthiness to the injured third parties. Since *Ryan* indemnity is the creation of this Court, the lower

courts need guidance from this Court as to the continued vitality of this doctrine.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

William B. Milliken, Esq.
HAYDEN AND MILLIKEN, P.A.
5915 Ponce de Leon Boulevard
Coral Gables, Florida 33146
Telephone: (305) 662-1523

Attorney for Petitioner

May 27, 1993

Appendix

INDEX TO APPENDIX

APPENDIX A:
Opinion of the First District Court of Appeal entered on November 19, 1992 and reported at 607 So.2d 516 (Fla.App. 1992) ..... App. A

APPENDIX B:
Order of the Florida Supreme Court entered on March 3, 1993 and reported at . . . So.2d . . . . App. B

APPENDIX C:
Final Judgment of the Circuit Court, Fourth Judicial Circuit for Duval County, Florida entered on October 7, 1991 ..... App. C

APPENDIX D:
Notice of Appeal dated October 18, 1991..... App. D

APPENDIX E:
Notice of Appeal dated October 25, 1991..... App. E

APPENDIX F:
Notice to Invoke Discretionary Jurisdiction dated December 15, 1992 ..... App. F

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 91-3434

NORTH FLORIDA SHIPYARDS, INC.,

Appellant,

v.

LYKES BROS. STEAMSHIP CO., INC.

Appellee.

Opinion filed November 19, 1992.

Appeal from the Circuit Court for Duval County Mattox Hair, Judge.

William B. Milliken of Hayden & Milliken, Miami, for appellant.

James J. Taylor, Jr., of Gabel, Taylor & Dees, Jacksonville, for appellee.

KAHN, J.

We find no error in the trial court's determination that appellee was entitled to indemnity from appellant under the facts of this case. *See Ryan Stevedoring Co. v. Pan-Atlantic*

Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956); *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 365-366 (6th Cir. 1986) (warranty of workmanlike performance runs from dockowner to shipowner; shipowner's negligence did not prevent recovery under theory of indemnity where conduct did not prevent or seriously hamper contractor's performance of its duly in accordance with its warranty of workmanlike service), *cert. denied*, 479 U.S. 849, 107 S.Ct. 173, 93 L.Ed. 2d 109 (1986); *Sims v. Chesapeake & Ohio Railway Co.*, 520 F.2d 556, 561 (6th Cir. 1975) ("The nature of the services performed by the wharfinger determines the extent of this warranty").

MINER and ALLEN, JJ., CONCUR.

APPENDIX B

SUPREME COURT OF FLORIDA
DISTRICT COURT OF APPEAL, 1ST DISTRICT
No. 91-3434

Wednesday, March 3, 1993

NORTH FLORIDA SHIPYARDS, INC.,

Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, SHAW, GRIMES and KOGAN, JJ., concur

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

A True Copy
TEST:
(S E A L)
BH
cc: Hon. Jon S. Wheeler, Clerk
Hon. Henry W. Cook, Clerk
Hon. Mattox Hair, Judge
William B. Milliken, Esquire
James J. Taylor, Jr., Esquire
Suzanne M. Schnabel, Esquire

APPENDIX C

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 88-7553-CA
DIVISION: CV-O

BETTY JEAN COWART,
as Personal Representative of
Estate of EDGAR A. COWART, deceased,

Plaintiff,

v.

GULF ATLANTIC TRANSPORT
CORPORATION, etc., et al.,

Defendants.

CASE NO.: 88-14343-CA
DIVISION: CV-O

WILLIAM LEVI ECHOLS and
JENNY ECHOLS, his wife,

Plaintiffs,

v.

GULF ATLANTIC TRANSPORT
CORPORATION, etc., et al.,

Defendants.

FINAL JUDGMENT

This matter is before the court upon the amended crossclaim of crossclaimant Lykes Bros. Steamship Co., Inc. ("Lykes") against crossclaim defendant North Florida Shipyard, Inc. ("NFS") for indemnification. Lykes seeks

judgment against NFS for amounts paid to plaintiffs in settlement of their actions and attorney's fees and costs.

Lykes' crossclaim is governed by the general maritime law of the United States. See generally 1 *Benedict on Admiralty* (6th Ed.) SEction 184.

FACTS

From the evidence presented, the court finds as follows:

Lykes and NFS entered into an oral agreement pursuant to which NFS was to repair Lykes' vessel, the M/V Lyra ("Lyra"), and provide a safe, suitable mooring berth for the vessel at NFS' ship repair facility at Commodore Point in Jacksonville, Florida. The mooring location assigned to the Lyra by NFS was outboard of three other vessels nested under the Hart Bridge. It was the only mooring berth available at the time.

Earl Truesdell, vice president of NFS, admitted that NFS orally agreed to provide Lykes a safe, suitable mooring berth for the Lyra including a duty to provide a berth that did not present a danger to other vessels using the St. Johns River.

Lykes' representative, Captain Richard E. Manchester, attended the arrival and berthing of the Lyra on October 17, 1986 and consented to the mooring location NFS had assigned for the Lyra. On October 20, 1986, the remaining crew members of the Lyra departed the vessel. After October 21, 1986, Lykes' presence at the shipyard was limited to a watchman service hired for the vessel by Lykes' local shipping agent who had no responsibility regarding the location of the mooring berth for the Lyra. NFS considered itself responsible for safe mooring of the vessel even though this watchman was on board.

On November 6, 1986, a fire marine boat operated by Edgar Coward and William Echols attempted to pass beneath the Hart Bridge between the outboard side of the Lyra and the nearest bridge support fender. The marine boat collided with the bridge support fender and then collided with an oncoming barge. Cowart died in the accident and Echols was injured.

Subsequently, these consolidated actions were filed by Echols and his wife seeking damages for personal injury and loss of consortium, and by Cowart's widow, as the personal representative of his estate, seeking damages for wrongful death. In their claims against Lykes, plaintiffs asserted that the mooring location of the Lyra constituted a hazard to navigation that was a proximate cause of the collision. Thereafter, Lykes asserted a crossclaim against NFS for any liability it might have to plaintiffs, and for attorneys fees and costs incurred in its defense of the action. The original crossclaim was filed on February 22, 1989. An amended crossclaim was filed on December 17, 1990.

The affidavit of Captain G. Kirk Greiner, Jr., marine safety specialist, was filed by the attorney for plaintiff, Bettie Jean Cowart on November 15, 1989. (Lykes exhibit 4). It was his opinion that the nesting of the ship underneath the Hart Bridge created ". . . an unreasonably hazardous condition . . .". He stated that this hazardous condition violated 33 U.S.C. 409, section 327.44, Florida Statutes, and general maritime law, and contributed to the occurrence herein.

Prior to commencement of trial, Lykes and NFS entered into settlement agreements with plaintiffs. Lykes paid twenty thousand dollars ($20,000.00) to settle plaintiffs' claims against it. The sole remaining claim, the instant amended crossclaim, was tried by this court on June 26, 1991 and December 10, 1990.

QUESTION PRESENTED

Whether Lykes is entitled to indemnity from NFS for amounts paid to plaintiffs ($20,000.00) in settlement of plaintiffs' claims against it, and for attorney's fees and costs.

LAW AND DISCUSSION

Under the maritime law, a party seeking indemnity must prove three facts in order to prevail: (1) that the crossclaimant was potentially liable to plaintiff; (2) that crossclaim defendant's acts or omissions contributed to crossclaimant's potential liability to plaintiff and (3) that crossclaimant's settlement of its potential liability was reasonable. *Vaughn v. Marine Transport Lines,* Inc., 723 F. Supp. 1126, 1128 (D.Md. 1989).

1. Lykes' Potential Liability

Lykes asserts it need only establish that it was potentially liable to plaintiffs in order to recover, wherein NFS argues that Lykes must establish proof of actual liability.

The original crossclaim of Lykes against NFS was filed on February 22, 1989. An amended crossclaim by Lykes against NFS was filed on December 17, 1990. Thus, NFS was on notice of the indemnity claim of Lykes for over two (2) years. NFS participated in all discovery, attended all hearings on various motions before the court, and ultimately settled plaintiffs' claim against it. Therefore, there was no necessity for a formal written demand or tender of the defense by Lykes to NFS since it was already on notice of a potential claim for indemnity. The filing of the crossclaim was tantamount to a tender of defense. In *Burke v. Ripp,* 619 F.2d 354 (5th Cir. 1980), the court refused to find that opportunity to defend was equated with "the formality of a

tender of the defense." 619 F.2d at 359. Furthermore, NFS was adequately protected since it had notice of the progress of the case, conducted settlement negotiations (it settled the plaintiffs' claims against it[1]), and it acquiesced in the overall settlement.

Under the facts of this case and based on the equities and fairness, the court finds that Lykes must demonstrate only potential liability as opposed to actual liability in order to recover indemnity from NFS, and it did so. See *Burke v. Ripp, supra; GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755 (11th Cir. 1987).

2. NFS' Acts or Omissions

The second fact Lykes must establish in order to prevail on its claim for indemnity is that NFS' acts or omissions contributed to Lykes's potential liability. Lykes asserts NFS is liable to it for indemnity on any one of three distinct legal theories: (a) implied warranty of workmanlike performance; (b) independent duty to exercise due care and (c) bailment. The court finds neither an independent duty to exercise due care nor a bailment was proven and those issues will not be discussed.

Lykes asserts that NFS is liable to it on the basis of an implied warranty of workmanlike performance. It contends

---

[1]The court has insufficient evidence before it that NFS actually participated in settlement negotiations with Lykes' attorney and plaintiffs' attorneys. The ruling here is made without specifically making that finding. However, if it is assumed that NFS participated in settlement negotiations with Lykes' attorney and plaintiffs' attorneys, the court would conclude that actual liability also is not required since the indemnitee informed the indemnitor of the settlement and the indemnitor failed to object thereto. *GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755, 760 (11th Cir. 1987), quoting *Burke v. Ripp, supra; Parfait v. Jahncke Service, Inc.,* 484 F.2d at 305.

that this is implied in maritime contracts for services such as a dock owner's agreement to provide a shipowner a safe, suitable berth for its vessel.

Lykes asserts its potential liability to plaintiffs was predicated on the mooring location assigned by NFS which constituted an unreasonable hazard to navigation. It contends that any liability found against Lykes would be the result of NFS' breach of its duty to provide a safe, suitable berth and breach of its coextensive implied warranty of workmanlike performance. The potential liability for mooring the Lyra in this location is supported by the affidavit of Captain G. Keith Greiner, Jr.

The implied warranty of workmanlike performance was first recognized in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), where the court held that a stevedoring contractor who entered into a service agreement with a shipowner was liable to the owner for damages sustained as a result of the stevedore's improper stowage of cargo on the theory that the stevedore, as part of its service agreement, impliedly warranted that it would perform its service in a workmanlike manner.

The implied warranty of workmanlike performance is based in contract and the tort theories of "active" or "passive" as well as "primary" or "secondary" negligence are inappropriate. See *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed 2d 732 (1964). Even though recovery may turn on the company's standard of performance, the action remains a contract, not a tort, action. *Ryan*, 350 U.S. at 133-34, 76 S.Ct. at 237.

Lower federal courts have expanded the application of the implied warranty beyond the context articulated in *Ryan* to a variety of maritime service relationships. For

instance, in *Sims v. Chesapeake & Ohio Railway Co.*, 520 F.2d 556 (6th Cir. 1975), the court held that there was an implied warranty of workmanlike performance running from a dock owner to a shipowner, the extent of which was determined by the nature of the services the dock owner agreed to perform. *Id.* at 561.

It was reaffirmed in *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361 (6th Cir. 1986), where a dock owner was found to have breached an implied warranty. The court held that a "shipowner is entitled to indemnity when a breach of the warranty of workmanlike performance results in loss, 'absent conduct on [the shipowner's] part sufficient to preclude recovery.' " *Id.* at 366.

NFS has asserted several grounds in support of its argument that the warranty of workmanlike performance does not provide a basis for indemnity between Lykes and itself, but the court finds none have merit.

Initially, NFS argues that the warranty of workmanlike performance has been abrogated by the 1972 amendments to the Longshoreman and Harbor Workers Compensation Act and the Supreme Court's decision in *United States v. Reliable Transfer,* 421 U.S. 397 (1975). However, the case law since 1972 continues to invoke the implied warranty of workmanlike performance, and no case law has been cited holding that *Ryan* indemnity is no longer viable.

While the court did raise questions concerning the continued viability of indemnity based on the *Ryan* warranty in *Smith & Kelly Co. vs. S/S Concordia Tadi,* 718 F.2d 1022 (11th Cir. 1983), the court limited its holding to the specific factual setting presented.

Further, NFS argues that, in the event *Ryan* indemnity is viable, Lykes is not entitled to indemnity because it was

not strictly liable for an injury based on the tort of unseaworthiness. However, in *Oglebay Norton, supra,* the court found that the wharfinger had breached its warranty of workmanlike performance, and was liable to the shipowner for indemnity, when it provided a dock whose conditions made it dangerous to others.

Finally, NFS argues that the implied warranty is inapplicable because the injuries in the present action were to third parties, rather than employees of Lykes. However, NFS has cited no authority for such a limitation of the warranty.

NFS had an implied warranty of workmanlike performance, which was coextensive with its duties under its agreement with Lykes, to provide a safe, suitable berth for the Lyra.

Lykes' potential liability to plaintiffs was predicated on the mooring location which posed an unreasonable hazard to navigation as supported in the affidavit of Captain Greiner. Therefore, any liability found against Lykes would have been as a result of NFS' breach of duty to provide a safe, suitable berth and breach of its implied warranty of workmanlike entitling Lykes to indemnity.

3. Reasonableness of Lykes' Settlement with Plaintiff

The final element of Lykes' cause of action for indemnity is the reasonableness of its settlements with plaintiffs. The aggregate settlement amount of plaintiffs' claims against Lykes was $20,000.00. NFS does not dispute the reasonableness of Lykes' settlement of its potential liability, and the court finds that it is reasonable.

Accordingly, it is

ADJUDGED:

1. Crossclaimant, Lykes Bros. Steamship Co., Inc., shall recover from crossclaim defendant, North Florida Shipyard, Inc., the sum of twenty thousand and no/100 ($20,000.00) for which let execution issue.

2. The court reserves jurisdiction to determine attorney's fees and costs incurred by Lykes Bros. Steamship Co., Inc. in defense of plaintiffs claims.

ORDERED at Jacksonville, Florida, this 4th day of October, 1991.

/s/ [ILLEGIBLE]
CIRCUIT JUDGE

Copy to:
James J. Taylor, Jr., Esquire
Nils Linfors, Jr., Esquire

APPENDIX D

[FILED OCTOBER 21, 1991]

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 88-7553-CA
88-14343-CA
DIVISION: CV-O
Florida Bar No.: 143193

LYKES BROS.,

Cross-Plaintiff/Appellee.

vs.

NORTH FLORIDA SHIPYARDS,

Cross-Defendant/Appellant.

NOTICE OF APPEAL

NOTICE IS GIVEN that the Cross-Defendant, appeals to the District Court of Appeal for the First District, the final judgement of this court rendered October 7, 1991.

The nature of the order appealed is a final judgment rendered on a nonjury trial awarding damages to the Cross-Plaintiff.

Dated this 18th day of October, 1991.

HAYDEN AND MILLIKEN, P.A.
Attorney for Cross-Defendant
5915 Ponce De Leon Blvd.
Suite 63
Miami, Florida 33146
(305) 662-1523

BY /s/ WILLIAM B. MILLIKEN
William B. Milliken

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished to James J. Taylor, Esquire, Gabel, Taylor, Dees, 1600 American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202.

BY /s/ WILLIAM B. MILLIKEN
William B. Milliken

APPENDIX E

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 88-14343-CA
DIVISION: CV-O

LYKES BROS.,

Cross-Plaintiff/Appellee,

v.

NORTH FLORIDA SHIPYARDS,

Cross-Defendant/Appellant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Cross-Defendant, NORTH FLORIDA SHIPYARDS, appeals to the District Court of Appeal for the First District, the Final Judgment of this Court rendered on October 7, 1991.

The nature of the order appealed is a Final Judgment rendered on a nonjury trial awarding damages to the Cross-Plaintiff.

The judgment rendered on October 7, 1991 was rendered in Case No. 88-14343 CA styled William Levi Echols and Jenny Echols, his wife, Plaintiffs v. Gulf Atlantic Transport Corporation, etc., et al, Defendants, and in Case No. 88-7553 CA CV-0, styled Betty Jean Cowart, as Personal Representative of Estate of Edgar A. Cowart, deceased, Plaintiff v. Gulf Atlantic Transport Corporation, etc., et al,

Defendants. The Final Judgment appealed from was rendered in both cases. Cross-Defendant, NORTH FLORIDA SHIPYARDS, previously filed a Notice of Appeal which has only been docketed in Case No. 88-7553 CA. The instant Notice of Appeal is for docketing in Case No. 88-14343 CA.

Dated this 25th day of October, 1991.

HAYDEN AND MILLIKEN, P.A.
Attorney for Cross-Defendant
5915 Ponce De Leon Blvd.
Suite 63
Miami, Florida 33146
(305) 662-1523

BY: /s/ [ILLEGIBLE]
WILLIAM B. MILLIKEN, ESQ.
Fla. Bar No. 143193

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished to JAMES J. TAYLOR, Esq., Gabel, Taylor, Dees, 1600 American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202.

/s/ [ILLEGIBLE]
WILLIAM B. MILLIKEN, ESQ.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
FLORIDA FIRST DISTRICT

CASE NO. 91-3434

NORTH FLORIDA SHIPYARDS, INC.,

Defendant, Petitioner

v.

LYKES BROS. STEAMSHIP CO., INC.,

Plaintiff, Respondent

NOTICE TO INVOKE
DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that NORTH FLORIDA SHIPYARDS, INC., Defendant/Petitioner, invoke the discretionary jurisdiction of the Supreme Court to review the decision of this Court November 19, 1992. The decision expressly and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of December, 1992 to JAMES J. TAYLOR, JR. Gabel, Taylor & Dees, Suite 1600, American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 32202.

HAYDEN AND MILLIKEN, P.A.
Counsel for Petitioner
5915 Ponce De Leon Blvd.
Suite 63
Coral Gables, FL 33146-2477
Telephone: (305) 662-1523

BY: /s/ WILLIAM B. MILLIKEN
WILLIAM B. MILLIKEN
Florida Bar No. 143293